UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STERICYCLE, INC.,	)		
	)		
Respondent,	)		
	)		
And	)	Case Nos.	04-CA-137660
	)		04-CA-145466
	)		04-CA-158277
Teamsters Local 628,	)		04-CA-160621
	)		
Charging Party	)		

RESPONDENT'S POST-HEARING BRIEF

NOW COMES Stericycle, Inc., Respondent herein, and files its post-hearing brief as follows:

STATEMENT OF CASE

Respondent is engaged in the business of providing medical waste and collection treatment services to commercial customers throughout the United States. It operates facilities located in Southampton and Morgantown, Pennsylvania, at which the employees are represented by Teamsters Local 628 (Union) in separate bargaining units. On September 29, 2014, the Union filed an unfair labor practice charge (04-CA-137600) alleging that Respondent had at its Southampton facility violated section 8(a)(5) of the Act by failing to provide certain relevant information requested by the Union and by unilaterally implementing a plan to make retroactive deductions from employees' paychecks to recoup unpaid health care contributions. Additional charges were filed thereafter in Case Nos. 04-CA-145466, 04-CA-158277, and 04-CA-160621, primarily relating to the Morgantown facility. A series of complaints were issued by the Regional Director, culminating in a Second Consolidated Complaint, which issued on March 29,

2016, as further amended on May 16, 2016, and again at the hearing on August 24, 2016. Respondent filed answers to the respective complaints, which denied the material allegations of the complaints. This matter was heard in Philadelphia, Pennsylvania, before Administrative Law Judge Michael A. Rosas on August 24 and 25, 2016. Respondent now files its post-hearing brief.

STATEMENT OF FACTS

A. Background

As noted above, Respondent operates facilities located in Southampton and Morgantown, Pennsylvania, at which the employees are represented by the Union in separate bargaining units. At all relevant times, John Dagle was the Union's Secretary/Treasurer, with responsibility for organizing new units and negotiating and administering collective bargaining agreements. (Tr. 12). [1]

The Southampton facility is a transfer station, and the Union has represented its drivers, driver techs, in-house techs, helpers, dockworkers, and long haul drivers since 1999. (Tr. 33, GC Exh. 2, p. 1). There are approximately 105 employees in the unit. (Tr. 33-34). These employees pick up "regulated medical waste" ("RMW") such as bandages, sharps containers, and bodily fluids from hospitals, doctor/dentist offices, and other medical facilities. The RMW is transported to facilities for processing prior to disposal. (Tr. 34). At all relevant times, the Southampton employees were covered by a CBA, which was effective from November 1, 2013 through October 31, 2016. (GC Exh. 2).

Following an election, which the Union won, the Union was certified as the representative of the Morgantown employees in September 2011. Unlike Southampton,

[1] References are to the transcript of the hearing and the exhibits that were introduced into evidence.

Morgantown is a treatment facility. RMW is delivered to the facility, where it is processed, chemically treated, and shredded in a Chemical Clave treatment system that is unique and proprietary to Respondent. The resulting product is placed in containers and disposed of in landfills. (Tr. 35-36, 232, 241). The Morgantown unit consists of "RMW plant workers, sharps plant workers, RMW shift supervisors, sharps shift supervisors/quality control representatives, drivers, dispatchers, yard jockey, maintenance mechanics, maintenance supervisor and painters." (GC Exh. 3, p. 1). There are approximately 55 employees in the unit. (Tr. 36). The Morgantown CBA was effective from date of ratification (on or about September 6, 2013) through February 29, 2016. (GC Exh. 3; Tr. 37). At the time of the hearing, the parties had recently reached a new CBA for Morgantown. (Tr. 36-37).

B. Alleged Unilateral Changes

1. The Recoupment of Health Care Premiums

Article 22.3 of the Southampton CBA provided (for the first time) that upon "ratification," employees would contribute "one (1 %) of their straight time hours paid per week to the cost of health coverage." Respondent was authorized to "deduct this amount bi-weekly and offset it against the employer's monthly contributions to the Teamsters Health and Welfare Fund." (GC Exh. 2, p. 12; Tr. 38, 112). The CBA was ratified on April 13, 2014, but Respondent experienced considerable administrative difficulties in setting up the deductions, and thus no deductions were made through the spring and summer months. (Tr. 38-39, 114, 188-189). Southampton's Plant Manager, Willie Riess, and Union Representative John Dagle discussed the issue periodically over the summer. (Tr. 39, 189). Eventually, Respondent ironed out the technical problems, completed its test runs, and decided that it could implement the deductions beginning with the September 12, 2014 payroll. Respondent also concluded that it was

appropriate to recoup the unpaid contributions over three bi-weekly pay periods so as to minimize any impact on the employees. (Tr. 189-190). On Wednesday, September 3, 2014, (2:51 p.m.), Riess emailed Dagle and advised him that Respondent's "plan is to deduct these amounts evenly over the next **three** pay days for each employee starting with the September 12, 2014 payday." Riess advised Dagle to let him know if Dagle had "any questions or concerns." (Resp. Exh. 1, p. 1; Tr. 40, 192). Riess also attached a spreadsheet reflecting each employee's earnings and the amount to be deducted over these three pay periods. The total amount to be deducted ranged from a low of $0 to a high of $166.94. (Resp. Exh. 1, pp. 2, 3; Tr. 192).

Dagle did not respond to Riess until 4:14 p.m. on Friday September 5, 2014, [2] when he sent Riess the following email: "The Union opposes Stericycle's unilateral decision to recoup unpaid health care deductions beginning September 8, 2014. Your recoupment decision is in violation of the Collective Bargaining Agreement and Stericycle's obligations under federal law." (Resp. Exh. 1, p. 5; Tr. 192). Riess subsequently replied to Dagle at 1:49 p.m. on Monday September 8, 2014, noting that the CBA obligated the employees to make the contributions and the Company was not precluded from catching up on deductions (similar to the Union catching up when employees were in arrears on Union dues). Riess suggested that Respondent could "pursue the amounts owed directly from the Union if you want to indemnify the employees for

[2] On cross-examination, Dagle for the first time claimed that prior to sending this email, he spoke to Riess by telephone and requested that Respondent bargain over the issue. (Tr. 120-121). This claim is inconsistent with the email he wrote, which made no reference to bargaining, and in which he took the position that the Company was precluded from recouping the money at all. Further, the record reflects that Riess was not unwilling to bargain the issue. If Dagle had in fact requested bargaining on September 4 or 5, Riess undoubtedly would have agreed. Riess denied having any conversations with Dagle prior to Dagle's September 5 email. (Tr. 192). Respondent contends that Dagle's testimony on this point is not credible.

this obligation;" otherwise Respondent planned on proceeding as stated. Riess, however, reiterated that he was "available to discuss." (Resp. Exh. 1, pp. 7-8; Tr. 192-193).

Dagle next responded to Riess by email at 11:04 a.m. on Tuesday, September 9, 2014. (Resp. Exh. 1, pp. 9-11). In his response, Dagle asserted that the proposed deductions would cause Respondent to pay the employees below the contractually established rates and that the Union would be submitting a grievance. Dagle further asserted that any "recoupment schedule must be negotiated with the Union" and that "[a]s a precondition for bargaining, Stericycle must first rescind its decision to commence recoupment and forego any further action pending agreement." Only then would the Union agree to "negotiate on this matter on September 23, or September 29, 2014."

Later that day, at 5:01 p.m., Riess responded by email. Riess disputed the Union's contractual position, but offered the following solution:

> All these defenses to the Company's actions aside, we are willing to bargain with the union over the timing of the catch-up deductions as announced in our September 3 letter to you and as you request in your communication today. Since we did not hear anything from you for days following that communication, the first payment on the schedule has already been processed in our payroll for this coming Friday. We will hold off on making any further deductions—notwithstanding our right to do so—until you and I have had a chance to further discuss.

(Resp. Exh. 1, pp. 12-13).

On September 10, 2014, Riess and Dagle met regarding a pending grievance. During this meeting they discussed the payroll deduction issue. According to Dagle, he and shop steward Harry Banks met with Riess in Riess's office. Dagle protested the Company's position and said that he thought the parties were going to negotiate over it. Riess responded that the Company was not required to negotiate. Dagle disputed this, and Riess asked for 5 minutes to call Respondent's corporate office. Dagle and Banks went outside to a picnic table, and when Reiss

returned, he stated that the Company was not agreeable to maintaining the status quo and would proceed as planned. (Tr. 42-43). On cross-examination, Dagle acknowledged that when he referred to the "status quo" he was insisting that the first deduction be reversed before the Union would bargain over the final two deductions. (Tr. 128-132). Riess testified that Dagle stated that the issue needed to be negotiated, but that the Company would have to restore the first deduction and that the Union would negotiate only if the "status quo" was restored. Riess explained that the payroll had already been processed for September 12 and could not be reversed, but that the Company would be willing to discuss the next two scheduled deductions. (Tr. 193-194). Banks did not testify.

On Thursday, September 11, 2014, at 2:56 p.m., Riess sent Dagle the following email:

> During our meeting yesterday, I explained that it was too late to reverse the upcoming deduction but offered to sit down and meet with you prior to taking any action on the others (without conceding our right to do so). Are you interested in meeting on these or not? I still have the same dates available. If I don't hear from you, we will simply proceed as planned. I don't need to remind you that payroll is processed a week in advance of the pay date.

(Resp. Exh. 1, p. 15).

Later that day at 5:00 p.m., Dagle responded by email. Dagle asserted that Riess had misstated the discussion of the 10th. According to Dagle, Riess had stated on the 10th that Respondent "was not going to restore the status quo," but that Riess believed he could persuade the Company "to halt the last two deductions so that we could meet." Dagle did not address Riess's renewed offer to meet regarding the subsequent planned deductions. (Resp. Exh. 1, pp. 14-15).

There were no further communications between Riess and Dagle on this issue. As employees are paid bi-weekly (Tr. 38), the final two deductions occurred on the September 26, 2014, and October 10, 2014 payrolls.

2. The Distribution of an Employee Handbook at Morgantown

It is undisputed that Respondent distributed an employee handbook to the Morgantown employees on February 26 and 27, 2016. (GC Exh. 32). The handbook was not distributed to the Southampton employees. (Tr. 110). A number of provisions in the handbook are inconsistent with the Morgantown CBA. (Tr. 90-106). On page 1, however, the handbook states: "Some benefits may not apply to union team members and in some cases the policies may be impacted by collective bargaining agreements." (GC Exh. 22). There is no evidence that Respondent actually applied the handbook in any manner inconsistent with the Morgantown CBA. (Tr. 110, 131-137).

C. Alleged Refusals to Furnish Information

Paragraphs 9 and 13 of the complaint allege that Respondent violated § 8(a)(5) by refusing to respond fully and adequately to a number of the Union's information requests. Respondent's answer denied these allegations, which are set forth below by topic.

1. Article 23.3 Requests

Article 23.3 of the Southampton CBA provided that unit employees would receive bi-weekly an amount consisting of $0.3125 per hour on a "pre-tax" basis provided that employees made an appropriate election into either Stericycle's 401K Plan or Employee Stock Purchase Plan, which amounts would be treated as "employee deferral contributions" subject to the terms and conditions of the relevant Plan[s], as applicable. Following the ratification of the CBA in April 2014, a dispute arose between Respondent and the Union concerning the Union's

contention that Respondent was not properly remitting these contributions. The Union filed a grievance on or about June 2, 2014, alleging that Respondent "has failed to remit the $0.312 per hour on a pre-tax basis for all straight-time hours paid to each active non-probationary bargaining unit employees' 401k account or Stock Purchase Plan as required by the Collective Bargaining Agreement." (GC Exh. 11). On September 4, 2014, the Union demanded arbitration. (Resp. Exh. 5). The following day, September 5, 2014, the Union submitted an eight-paragraph request for information entitled "Grievance – Violation of Article 23, subsection 23.3 Dated June 2, 2014." (GC Exh. 12). On September 18, 2016, the Union submitted an additional three-paragraph request for information related to "Grievance -- Violation of Article 23, subsection 23.3." (GC Exh. 14). On September 22, 2014, Respondent responded to both the September 5 and the September 18 requests. (GC Exh. 15 B).

At issue in this proceeding are paragraphs 1, 2, 6, and 8 of the September 5 request and all three paragraphs of the September 18 request. For ease of review, Respondent's response is set forth in italics following the corresponding paragraph of each request:

September 5

1. Copies of all bargaining unit employees' bi-weekly earnings statements to include all earnings, deductions and year to date totals for . . . the period April 13, 2014 through September 6, 2014.

   The Company has attached information responsive to this request. [Payroll records, but not earnings statements, were attached in a pdf format. (Tr. 278)]

2. On an ongoing basis, beginning with the period starting September 7, 2014 provide copies of all bargaining unit employees' bi-weekly earnings statements to include all earnings, deductions and year to date totals for each subsequent bi-weekly pay period.

   The relevancy of any information requested "on an ongoing basis" is not clear. The Company also objects based on the fact that providing such records for an indefinite period of time is unduly burdensome.

Please identify any specific time periods and how each is related to the Union's investigation of this grievance or any particular grievance and the company will re-evaluate the reasonableness of the request.

. . . .

6. Provide copies of any communications, written or electronic between any Stericycle representatives or agents concerning or relating to Stericycle's implementation of Article 23, subsection 23.3 of the Collective Bargaining Agreement.

   The Company will not be providing this documentation as it bears no relevance to the Union's prosecution of the above-mentioned Case and is aimed solely at discovering the Company's legal theory and strategy in the arbitration of the same.

. . . .

8. Provide copies of the meeting notes of Stericycle's representatives or its agents taken during the meetings identified in number 7 above [meetings at which Stericycle discussed its obligations under Article 23.3].

   The Company denies this request for the reasons cited in number 6.

September 18

1. Copies of all documents, including bargaining notes, regarding discussions over the Southampton 401 (k) provision during negotiations leading to the November 1, 2013 through October 31, 2016 collective bargaining agreement, showing, the dates of each session, the names of those present, the start and end time of sessions and breaks, sidebar discussions or other communications between sessions, and communications concerning bargaining before or after sessions whether in person, writing or telephone.

   Again, the Company objects to this request on the grounds that it seeks the Company's legal theories and defenses related to the above-referenced arbitration. The Company also denies this request on the grounds that the Union's requests for its notes are irrelevant to the Union's own position taken with respect to the grievance. Further, the Company maintains its bargaining notes are confidential.

2. Copies of any written and/or oral collective bargaining proposals exchanged between Stericycle and the union regarding negotiations leading to the Southampton 401 (k) provision, together with documents identifying the date of each such proposal and the identity of the party who made each such proposal and all documents showing responses to the proposals.

   First, the Company maintains that the Union already has copies of all proposals and TAs which were exchanged during negotiations for the agreement. Further, the Company believes such requests to be pre-arbitral discovery and denies them on that basis.

3. Copies of all documents showing agreements, tentative agreements, letters of understanding, and all memoranda of agreement between Stericycle and the Union regarding the 401 (k) provision for the Southampton unit during the period of negotiations leading to the November 21, 2013 through October 31, 2016 collective bargaining agreement.

   The Company denies this request for the reasons cited in 2, above.

The Union did not respond or follow up further regarding these requests at any time until on or about August 18, 2015, when the Union's counsel issued a subpoena to Respondent in conjunction with the arbitration of the Union's grievance, which was scheduled to commence on September 10, 2015. (CP Exh. 1; Resp. Exh. 7, p. 2; Tr. 278-279). In many respects, the subpoena mirrored the Union's prior information requests. Paragraph 2 of the subpoena sought documents relating to Respondent's "implementation of Article 23.3," clearly encompassing the documents requested in paragraphs 6 and 8 of the September 5, 2014 request, as well as paragraphs 1, 2, and 3 of the September 18, 2014 request. Paragraphs 3 and 4 of the subpoena mirrored paragraphs 1 and 2 of the September 5, 2014 request. On September 4, 2015, Respondent's counsel, Dawn Blume, responded to the subpoena. (Resp. Exh. 7). Among the documents provided was a payroll report (in Excel spreadsheet format) "containing everything found on the 'earnings statements'" sought by the Union. With respect to the actual earnings statements, Blume explained "that it takes a payroll clerk in our department 3-4 minutes to

download and print out a single earnings statement which is the equivalent of 8 hours of time for a single payroll period for the entire unit in Southampton" and that "we simply do not see the point in engaging in this manual exercise when the information on the earnings statements is identical to what is contained in the report I have attached hereto." Despite Respondent's unwillingness to perform this manual exercise, Blume noted that she had "arranged for John Dagle, your client to have access to our payroll system for the limited purpose of accessing and printing (if he desires) the 'earnings statements' he continues to demand from the Company." Blume advised that his credentials and log-in information would be forthcoming.

On September 8, 2015, Blume again emailed Newlin. (Resp. Exh. 8). As she had indicated she would in her September 4 email, Blume attached a summary payroll report for 2014 and 2015, and she provided the log-in information for the Union to directly access the employees' earnings statements. (Tr. 292-293). The arbitration hearing commenced on September 10, 2015. At the hearing, the arbitrator revoked the Union's subpoena to the extent it sought the Company's bargaining notes. (Tr. 311). Two hearing days have occurred, but the hearing had not concluded as of the time of the unfair labor practice hearing. (Tr. 51, Tr. 276-277).

In mid-September 2015, Respondent was advised by the Union that it was having trouble printing out the earnings statements. Respondent's corporate Human Resource Information Systems (HRIS) Manager, Dave Beaudoin, got involved in an effort to help correct whatever problems the Union was having. On October 5, 2015, Beaudoin contacted the Union's administrative assistant by email to offer his assistance. (Resp. Exh. 11, p. 3). Beaudoin inquired as to whether he "could jump on a WebEx meeting, so [he] could log on to your computer and verify that you are appropriately configured to run the software." The Union, however, was

unwilling to allow Beaudoin to access its computer. Following further discussions, Beaudoin forwarded a file on November 5, 2015 that the Union needed to install. (Resp. Exh. 11, p. 2). On November 17, 2015, Beaudoin spoke with the Union's administrative assistant and verified that she was able to access the earnings statements. As far as Beaudoin could determine, the issue was resolved, and he received no further inquiries or requests from the Union. (Resp. Exh. 11, p. 1; Tr. 203-207).

2. Article 22.3 Requests

On September 11, 2014, Dagle sent Riess a letter requesting information regarding "Article 22, subsection 22.3." Paragraphs 1 and 5 are the only paragraphs in issue in this proceeding:

> 1. Provide copies of any communications, written or electronic between any Stericycle representatives or agents concerning or related to Stericycle's decision to deduct the amounts (copy enclosed) evenly over the next three (3) paydays for each employee starting with the September 12, 2014 payday.
>
> 5. Provide copies of any communications, written or electronic between any Stericycle representatives or agents regarding Stericycle's implementation of Article 22, subsection 22.3 of the Collective Bargaining Agreement.

(GC Exh. 5).

Labor Relations Manager Carol Fox responded on September 22, 2014, as follows:

> 1. The Company fails to see the relevance its own internal communications have on whether the Company violated the contract as alleged by the Union, i.e., whether the catch-up deductions violate the wage provisions or the above-cited provision of the contract. For this reason and because many of those same communications are privileged and/or confidential, the Company will not be furnishing the information. If there is any specific communication which you believe is relevant, please identify it so the Company can make a further assessment of its duty to furnish it.

5. This request is unclear. In terms of any internal communications that were not provided to employees or the Union, these communications are confidential, privileged and irrelevant.

(GC Exh. 7).

On September 26, 2014, the Union submitted an additional request for information regarding "Article 22, subsection 22.3." Paragraph 3 of this request is in issue:

3. Provide copies of Stericycle's bargaining notes, including notes of side bar discussions or other contacts with Union representatives concerning, or relating to discussion of employee health coverage deductions.

(GC Exh. 8).

Fox responded as follows on October 17, 2014:

> The Company objects to this request on the grounds that its internal bargaining notes are confidential and irrelevant to the fact of whether or not there has been a violation of the CBA as claimed by the Union. As far as the other information pertaining to contacts with Union representatives, this request is overly broad, as the Company has had many such contacts and conversations. Please provide a specific timeframe and if you can, reference to a specific communication.

(GC Exh. 9).

Dagle responded further on October 20, 2014. Regarding paragraph 3, Dagle reiterated his request for bargaining notes, but with respect to other notes, he requested "notes (and/or other documents) related to conversations between Stericycle representatives and the union over the employer's failure to deduct employee health contributions from the date of ratification to the date of this letter." (GC Exh. 10). No further communications occurred regarding this request.

3. <u>Ebola "Video"</u>

On or about November 12, 2014, Safety Manager Ron Maggiaro gave a power point presentation to Morgantown employees on Ebola waste. Although Respondent does not handle Class-A medical waste (Ebola etc.), the Ebola issue was in the news at the time and questions

had arisen from employees. During the presentation, which lasted 10 to 15 minutes, Maggiaro discussed how and where the virus originated and how it was introduced to the United States. He also presented slides showing the packaging requirements for Ebola waste, which made the waste easily identifiable. These packaging requirements are far more stringent than those for RMW. (Tr. 227-230). Employees were not given copies of the presentation.

On November 13, 2014, Dagle sent Maggiaro an email requesting "a copy of the EBOLA video which you had bargaining unit employees view at your safety meeting yesterday." On November 18, 2014, not having heard back, Dagle sent another email to Maggiaro stating that he would be in Morgantown for a meeting that day and that he would pick up a copy of the EBOLA video. (GC Exh. 17). Later that day, Carol Fox responded, requesting that Dagle copy her on future requests. (GC Exh. 18).With respect to Dagle's request, Fox noted that Respondent only handled RMW, not Class A waste such as Ebola. Fox explained that the Company "decided to educate our employees on the Company's activities related to Ebola." Fox asserted that the presentation was "confidential and proprietary" and that release of this information "could cause a great deal of speculation and public concern if it was released to third-parties outside our organization." Fox declined to provide a copy of the presentation, but offered "to review the power-point presentation with you that we shared with the employees in person, at a mutually convenient time at our offices." Dagle responded the following day, November 19, questioning the validity of the expressed confidentiality concerns, but stating that the Union would "agree that the power-point presentation will not be shared with anyone outside the union's officers, representatives and agents." On November 25, 2014, Fox responded as follows:

> As I previously stated, these materials are extremely sensitive and you should know that Stericycle has spent a great deal of time answering questions from the public and other regulators surrounding whether EBOLA contaminated waste will be transported and/or treated within

> their town, municipality, jurisdiction etc. Many of these questions came from mere speculation and panic a situation that we are trying to avoid. For this reason, we did not permit any of the Morgantown employees to receive copies of the materials we presented to them. We only shared with them the presentation in person that I already offered to share with you. As I already stated to you, these employees will not transport the waste as it is outside their position duties. We simply presented them with the information because we want to educate all the employees on our activities in this area.
>
> Again, my offer to present to you, at a mutually convenient time, the same materials that we presented the employees still stands.

(GC Exh. 18, pp. 1-2).

On December 1, 2014, Dagle responded, stating that Respondent's "proposal to just let me view the presentation is inadequate" as "Local 628 needs to verify the accuracy of the information you are providing represented employees to ensure that their safety is adequately protected." To this end, "Local 628 must submit a copy to professional experts in the infectious disease and biosafety field for their review," and requiring the expert to come to Morgantown "would be neither cost effective nor practical." Dagle reiterated the Union's willingness to bargain over a confidentiality agreement. (GC Exh. 18, p. 1). On January 16, 2015, Respondent posted a notice at Morgantown explaining that employees were not to handle Ebola waste and that the Ebola presentation had been given for informational purposes only. Respondent provided Dagle with a copy of the notice on January 20, 2015. (Resp. Exh. 4; Tr. 147).

4. Vehicle Backing Program

Employee James Clay was involved in an accident, which subjected him to discipline under Respondent's repeater policy. (Tr. 212). Dagle and Transportation Manager Robert Schoennagle were scheduled to meet on this issue on November 28, 2014. In anticipation of this meeting, on November 24, 2014, Dagle requested a number of documents, including a "copy of the Company's vehicle backing program." (GC Exh. 19; Resp. Exh. 10; Tr. 66-67). Schoennagle

forwarded the information, except for the vehicle backing program, to Dagle on November 25, 2014. (Resp. Exh. 10; Tr. 213-214). Schoennagle and Dagle met as scheduled on November 28, 2014. During this meeting, they discussed the vehicle backing program. Schoennagle explained that it consisted of a video purchased from an outside vendor and a power point presentation created by Stericycle. He further advised Dagle that he did not have a copy of the vehicle backing program and would need to inquire further. (Tr. 67, 215-216).

No grievance was filed by the Union, (Tr. 225), and by all appearances, the issue lay dormant until late January 2015, when Dagle inquired again. (Tr. 167). At that time, Schoennagle told him that the program was proprietary and could not be provided. (Tr. 67-68; Tr. 216-217). However, on January 29, 2015, Schoennagle sent Dagle an email offering to allow the Union to "sit in on a presentation of this program." (GC Exh. 20; Tr. 68). The Union deemed this offer inadequate, and Dagle did not pursue this offer. (Tr. 69-70, 168).

On January 30, 2015, the Union filed a charge alleging that Respondent was unlawfully refusing to furnish the vehicle backing program. On March 2, 2015, Carol Fox responded further to Dagle. Fox stated that although Respondent considered the power point presentation to be confidential and proprietary, it was nevertheless providing a copy, which she attached with her response. However, the video was a copyrighted product produced by J.J. Keller, an outside vendor, which Respondent was licensed to show to employees, but was not permitted to make copies. Fox offered to set up a time for Dagle to view the video. Alternatively, she provided a link to the J.J. Keller website, where the Union could purchase a copy of the video. (GC Exh. 21). Dagle, however, never pursued either option. His categorical position was that if Respondent showed any video or presentation of any type to employees, the Union was entitled

to a copy at no cost. Dagle admitted that he never even went to the J.J. Keller website to determine what the video might cost. (Tr. 168-169, 217-218).

5. Harassment Training Video

On December 30, 2014, Dagle requested "a copy of the Code of Conduct and Harassment Training video which the Company had bargaining unit employees view in its training." Morgantown Plant Manager Mike Valtin responded later that day as follows: "The Code of Conduct and Harassment Training video are proprietary and can be available for you to view; however, the Company cannot give you a copy." (GC Exh. 26). Dagle made no effort to view the video. (Tr. 150). The video itself is a 10 to 15 minute video that was commissioned by Respondent from a law firm in Chicago and consisted of a "lawyer" interviewing a "client" and answering questions from the client regarding harassment. (Tr. 252-253).

6. Supervisor Ron Lobb Information

On November 20, 2014, the Union filed "a formal grievance on behalf of Local 628, Ryan Suobra [3] and the bargaining unit" alleging that "supervisor Ron Lobb egregiously and forcefully placed his hands on, grabbing, pushing and pulling employee Ryan Suobra on Saturday, November 15, 2014." (GC Exh. 23; Tr. 72). Plant Manager Mike Valtin responded to the grievance on December 5, 2014, as follows:

> While the Company does not necessarily agree with the Union's statement that Ron Lobb's action toward Ryan Soubra was egregious or forceful, we believe that no Manager or Supervisor should touch an employee. The Company agrees that this behavior is unacceptable and will not be tolerated. Therefore, Mr. Lobb's unacceptable behavior has been addressed with him per company policy. Harassment Training will be held for all Morgantown Plant Supervisors and Team Members by January 1st, 2015.

[3] Dagle spelled the employee's name as "Suobra;" whereas, Valtin spelled it as "Soubra."

(GC Exh. 24; Tr. 73).

Although Valtin had essentially granted the Union's grievance, Dagle advised Valtin on December 11, 2014, that the Union "intends to proceed to Step 2 regarding the Ryan Suobra grievance." Dagle requested six items of information. The first item requested was a copy of any videos or pictures regarding the incident between Suobra and Lobb. A security video was in fact provided to Dagle at the step 2 meeting on December 22, 2014. In issue are items 2 through 6 of Dagle's information request, which are set forth below:

> 2. The names and statements of any witnesses of which the Company is aware that have knowledge of the facts and circumstances regarding supervisor Ron Lobb's egregious and unacceptable action on Ryan Suobra on November 15, 2014.
>
> 3. Copies of all investigative reports concerning supervisor Ron Lobb's egregious and unacceptable action on Ryan Suobra on November 15, 2014 which are in the possession of the company including the company's investigative notes of interviews of witnesses or persons interviewed regarding this incident.
>
> 4. Copies of all documents, reports, emails, etc., relevant to the Company's investigation of supervisor Ron Lobb's egregious and unacceptable action on Ryan Suobra on November 15, 2014.
>
> 5. Copies of all documents, reports, emails, etc., related to Steicycle's discipline and reprimand of supervisor Ron Lobb for his egregious and unacceptable action on Ryan Suobra on November 15, 2014.
>
> 6. Copies of all documents, reports, email, etc., in supervisor Ron Lobb's personnel file regarding similar previous instances of egregious and unacceptable actions on employees.

(GC Exh. 25).

A step 2 meeting was conducted on December 22, 2014. (Tr. 74). Dagle and Valtin subsequently exchanged emails on December 30, 2014. (GC Exh. 25, 27). It is undisputed that Dagle was provided "video footage with regard to the Lobb/Soubra matter" and was permitted to

"read the discipline notice the Company issued to Supervisor Lobb." (Tr. 75). With respect to the other information requests, Valtin responded as follows:

> Your request regarding the company's investigation into misconduct and personnel information of a non-bargaining unit employee (items 2-6) are denied because they are not presumptively relevant and you have not provided any reasons to justify their relevance as to any grievance or discipline issued to a bargaining unit employee.

(GC Exh. 27, p. 2). [4]

On January 7, 2015, Dagle responded to Valtin, stating that the basis for the Union's request was "to evaluate whether the discipline [of Lobb] is sufficient to deter further misconduct against bargaining unit employees." (GC Exh. 27, p. 2). Valtin replied on January 13, 2015, noting that "Soubra received no disciplinary action resulting from the incident" and that "the Company provided the Union with the discipline to demonstrate its good faith and commitment to its policies and to assure the Union that Mr. Lobb will continue to suffer consequences for violating Company policies, which include inappropriate interactions with coworkers." Valtin further stated:

> The Union does not have any right to grieve or challenge any discipline issued to a non-bargaining unit member. Consequently, your rationale for wanting to review the personnel file of Mr. Lobb—to determine if the discipline issued was appropriate and sufficient—is not related to the Union's representational duties. As a result, your reasons for wanting the requested information does not overcome Mr. Lobb's right to confidentiality of his personnel information. Therefore, your request is denied.

(GC Exh. 27, p. 1). There were no further communications between the parties regarding this issue.

[4] Dagle testified that at some point, Valtin provided him with a statement from one employee. (Tr. 152).

7. TMX Team Meetings

On July 15, 2015, Dagle requested certain information regarding a sign-up sheet that had been posted at the Morgantown facility seeking volunteers to participate in a new workplace group that ostensibly would "discuss and implement the ideas we receive from the employee surveys and feedback from . . . meetings with the TMX team." (GC Exh. 28; Tr. 80). Carol Fox responded on August 7, 2015, explaining that the sign-up sheet had been posted in error at Morgantown, that a new notice had been posted explaining the error, and that "there is no employee workgroup being formed in Morgantown." Fox further explained that "TMX stood for 'Team Member Experience,' which is Stericycle's Human Resources department." Although Fox viewed most of the Union's request as irrelevant given the disbanding of any employee workgroup, she did provide copies of an employee survey that had been taken, along with the results of the survey and power points that had been communicated to employees, redacted to exclude comparisons to other Stericycle facilities. (GC Exh. 29; Tr. 81-86, 248-252). The only paragraph of the Union's information request that is in issue is paragraph 4, which requested "[c]opies of all documents concerning or relating to the 'TMX team' meetings with Morgantown employees." (GC Exh. 28). As noted above, Respondent furnished the slides that were shown to employees, excluding or redacting any slides that showed comparisons between Morgantown and other Stericycle facilities.

8. 2014 Employee Handbook

On December 1, 2014, Dagle made a request for "a copy of the current Employee Handbook employees must sign." (GC Exh. 18). This request was triggered by a statement that Carol Fox made on November 25, 2014, in responding to Dagle's request for the Ebola presentation. Specifically, Fox had stated: "Under common law, employees of Stericycle are

required to keep non-public information confidential. Employees also agree to this requirement when they sign our Handbook." (GC Exh. 18). Fox did not respond to this request until March 2, 2014, when she wrote:

> Finally, the Company wants to address your November 25, 2014 request for the employee handbook. Stericycle employees sign copies of the employee handbook at hire which is what I previously referenced when I relayed that employees are bound by prohibitions in the handbook on releasing confidential, proprietary and non-public information of the Company. When you requested a copy of the Handbook, we searched our records and it appears that the Company has not distributed or maintained Handbooks in Southampton since 2009 and Morgantown since 2011. As a result, the Company is now distributing its 2015 handbooks in these locations. I am attaching a copy here for your reference.

(GC Exh. 21). [5]

D. Alleged Coercive Policies

The General Counsel alleges that Respondent implemented and maintained a number of overly broad policies that could be construed to restrict lawful section 7 activity. Respondent denied these allegations. The specific provisions of these policies are set forth and discussed in the Argument section of the brief.

E. Respondent's Eighth Affirmative Defense

In its Answer to the Second Consolidated Complaint, Respondent raised the following Eighth Affirmative Defense:

> The Second Consolidated Complaint is tainted by the involvement of the Regional Director of Region 4 and should be transferred to a different region for independent review, reconsideration, and processing. As reflected in the report issued by the Inspector General in OIG-I-516, the Regional Director for Region 4 has a substantial conflict of interest as a result of his service as Chairman of the Peggy Browning Fund from 2011 until August 2015, when he was compelled to resign his position with

[5] The handbook was distributed to Morgantown employees on February 26 and 27, 2015. (GC Exh. 32; Tr. 90). The handbook was not distributed at Southampton. (Tr. 109).

> the Fund. Although the Regional Director has indicated in the Second Consolidated Complaint that he has recused himself from this matter, he did not recuse himself from the issuance of the original Complaint (04-CA-137660) on January 27, 2015 or the issuance of the Consolidated Complaint (04-CA-137660, 04-CA-145466) on April 3, 2015. Thus, these proceedings are inherently tainted, and the only appropriate remedy is to transfer the matter to a different Region for independent review, reconsideration, and processing.

On May 16, 2016, the General Counsel filed a motion in limine seeking to preclude Respondent from presenting evidence on, or otherwise litigating, its Eighth Affirmative Defense. On May 19, 2016, Respondent filed a motion to dismiss with the Division of Judges. Rather than rule on the motion, the Chief Administrative Law Judge suggested to the parties that they consider postponing the hearing in order to allow sufficient time for Respondent's motion to dismiss to be filed directly with the Board. The hearing was in fact postponed until August 24, 2016, and on June 29, 2016, Respondent filed its motion to dismiss with the Board. On August 19, 2016, the Board issued an order referring the motion back to the ALJ. On August 24, Judge Rosas entered an order denying Respondent's motion. Respondent was also precluded from introducing evidence (beyond that attached to the motion to dismiss).

ARGUMENT

A. Respondent Did Not Unlawfully Fail To Bargain Over The Recoupment Of Health Care Premiums.

Paragraphs 8 (a) and 8(d) of the complaint allege that on or about September 12, 2014, Respondent unilaterally changed employee terms and conditions of employment at the Southampton facility by implementing a plan to recoup employee health care premiums over three pay periods. Respondent denied the allegation.

The first question that must be addressed with respect to this allegation is whether Respondent had any obligation to bargain over its plan to recoup the employees' unpaid health

care premiums over three pay periods. It is undisputed that beginning with the ratification of the Southampton CBA in April 2014, employees became obligated for the first time to contribute 1% of their straight-time pay to the cost of health care coverage. Further, the CBA provided that Respondent "shall deduct this amount bi-weekly and offset it against the employer's monthly contributions" to the Union's health and welfare fund. (Article 22.3). Thus, Respondent's right to recoup the unpaid premiums from the employees is not subject to question. The General Counsel's apparent contention, however, is that having failed to make the deductions over a four-month period (April 13, 2014 – August 9, 2014), Respondent became obligated to bargain with the Union over the manner in which it recouped the unpaid premiums; i.e., the timing and amount of the recoupments. For reasons discussed below, this contention is without merit.

First, while wages and benefits are without question a mandatory subject of bargaining, Respondent did not effectuate any change in employee wages and benefits. The amounts deducted were exactly what the employees were required to contribute and Respondent was explicitly authorized to deduct. No employee was paid less than what he/she was contractually entitled to receive. The General Counsel and the Union, however, contend that because larger amounts than normal were deducted during the three pay periods in question (in order to recoup the amounts that should have been, but were not, deducted previously), employees were subjected to paychecks that were lower than usual for these three pay periods. While this is true, it does not alter the fact that Respondent simply exercised its contractual right, albeit somewhat tardily, to deduct these employee contributions. Respondent contends that this does not constitute a "change" in employee wages and benefits.

Even assuming, arguendo, that the retro-deductions can be characterized as a "change," a "unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) and

(1) only if the change is a 'material, substantial, and significant' one." *Berkshire Nursing Home,* 345 NLRB 220, 220 (2005) (citing *Crittendon Hospital*, 342 NLRB 686, 686 (2004)). Here, any "change" that can be said to have occurred with regard to employee wages does not rise to the level of a "substantial, material and significant" change. In *Alexander Linn Hospital Assoc.,* 288 NLRB 103 (1988), *enf'd sub nom. NLRB v. Wallkill Valley General Hosp.,* 866 F.2d 632 (3d Cir. 1989), the Board addressed a very similar situation. In that case, due to an administrative error, the employer failed to deduct union dues on behalf of some 13 unit employees over a period of time, but continued to remit the dues to the union. When it discovered the error, the employer decided to recoup the amounts owed over two pay periods if greater than $10 and over one pay period if less than $10. The amounts owed by the employees ranged from $1.60 to $38.60. Although the employer notified the union, it did so only after the payroll had been prepared, and it explicitly refused to bargain. The administrative law judge noted that although the General Counsel had cited no supporting authority, he would assume arguendo "that the payroll correction here in issue rises to the level of a mandatory subject of bargaining." *Id.* at 118. Nevertheless, he concluded that there had "been no material, substantial, or significant change in a condition of employment." *Id.* The judge further observed that "there were no permanent changes in wages or the method of payment, only a handful of employees in the two bargaining units were involved, the amounts of money were insubstantial, the payroll corrections had no lasting, continuing, or substantial impact on wages, there was a reasonable business necessity for immediate action, and it was so clearly justifiable and of an administrative nature as to constitute a management prerogative." *Id.* The judge recommended dismissal of this allegation, and the Board agreed "essentially for the reasons set forth by the judge." *Id.* at 104.

Much the same can be said for Respondent's deductions in this case. There was no permanent or ongoing change in wages, the amounts deducted were clearly owed, and Respondent had a contractual right to deduct the amounts owed. Although the amounts deducted by Respondent were greater than those deducted by the employer in *Alexander Linn*, it is noteworthy that the events in that case occurred in 1978; whereas, the events here occurred in 2014. The Board's decision in *Alexander Linn* does not recite the actual wage rates in place; however, a September 1978 BLS survey[6] of wage rates in hospitals reflects that the average wage rates for general duty nurses at that time was between $5.84 per hour and $8.32 per hour, with the highest pay being in San Francisco. The average wage in New York/New Jersey was $7.59 per hour. Even if we assume that the rates for nurses at *Alexander Linn* (New Jersey) in 1978 were on the high end—say $9 per hour—the maximum deduction taken by Alexander Linn in any pay period was $19.30, or 2.1 hours of pay. Here, the maximum deduction taken by Respondent in any pay period was $55.65 for Harry Banks, whose wage rate was $24.55 per hour. This deduction equates to 2.3 hours of pay. Thus, the amounts deducted by Respondent were no less "insignificant" than the amounts deducted in *Alexander Linn.* For all these reasons, Respondent was under no obligation to bargain with the Union prior to implementing its plan.

But even if we assume the existence of a bargaining obligation, Respondent satisfied that obligation. It is well established that "an employer's obligation, prior to making a change in the terms and conditions of employment, is to give notice of its planned change and afford a

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[6] *Industry Wage Survey: Hospitals and Nursing Homes, September 1978*, U.S. Dept. of Labor, Bureau of Labor Statistics, November 1980, Bulletin 2069. Respondent accessed this information at: http://journals.lww.com/ajnonline/Citation/1981/09000/Salary_Figures_For_Staff_Nurses_Updated_to_1980_.6.aspx through an American Journal of Nursing article, Volume 81 – Issue 9 – pages 1560, 1562 (September 1981).

reasonable opportunity for bargaining. If an employer meets its obligation and the union fails to request bargaining, the union will have waived its right to bargain over the matter in question." *Associated Milk Producers, Inc.*, 300 NLRB 561, 563 (1990). "[T]he notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), *enf'd*, 722 F.2d 1120 (3d Cir. 1983). "The Board has on occasion found as little as 2 days' notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient." *Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988). Once timely notice is provided, "the union must promptly request bargaining to avoid a waiver, and merely protesting the impending change is not sufficient." *Ciba-Geigy*, at 1017. Similarly, "filing an unfair labor practice charge over the matter" is insufficient. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979), *enf'd*, 644 F.2d 40 (D.C. Cir. 1981).

Here, Riess notified Dagle of Respondent's recoupment plan on Wednesday, September 3, 2014, at 2:51 p.m., and provided him with a detailed spreadsheet reflecting the amounts to be deducted. Riess invited Dagle to let him know if Dagle had "any questions or concerns." (Resp. Exh. 1, p. 1). Dagle did not respond until two days later, at 4:14 p.m. on Friday September 5, 2014. In his response, Dagle did not request bargaining. Instead, he protested the decision, asserting that the "recoupment decision is in violation of the Collective Bargaining Agreement and Stericycle's obligations under federal law." (Resp. Exh. 1, p. 5). It was not until the morning of Tuesday, September 9, 2014—six days after receiving notice of Respondent's plan—that Dagle asserted that any "recoupment schedule must be negotiated with the Union." However, Dagle, by his own admission, conditioned bargaining on Respondent restoring the "status quo," which Dagle defined as paying back any monies already deducted. When Riess explained that

the payroll had already been processed for September 12, but that Respondent would hold off with the next two deductions if the Union wished to discuss the issue, Dagle rejected this offer out of hand.

Dagle's request to bargain was untimely with respect to the first deduction. With respect to the second and third deductions, Dagle improperly conditioned bargaining on reversal of the first deduction. Even if it could be found that the Union was denied a reasonable opportunity to bargain the first deduction, it clearly had a sufficient opportunity to bargain any further deductions. In summary, Respondent's recoupment plan did not constitute a change in wages. Insofar as it is found otherwise, the change was not a material, substantial, and significant one. Finally, Respondent gave the Union adequate notice and an opportunity to bargain, but the Union waived this right. For all of these reasons, Respondent requests that paragraph 8(a) of the complaint be dismissed.

B. Respondent Did Not Unilaterally Change Terms and Conditions of Employment By Distributing an Employee Handbook to Morgantown Employees.

Paragraph 7 of the complaint alleges that by distributing an employee handbook to Morgantown employees that contained provisions inconsistent with the CBA, Respondent unilaterally changed terms and conditions of employment for these employees. Paragraph 13 of the complaint alleges that Respondent's conduct violated §§ 8(a)(5) and (1). These contentions are without merit.

It is undisputed that Respondent distributed an employee handbook at the Morgantown facility that contained a number of policies and provisions that were inconsistent with the CBA. The record, however, contains not a scintilla of evidence that Respondent actually changed any term or condition of employment or ever took the position that the handbook trumped the CBA. Merely distributing a document that is inconsistent in certain respects with a collective

bargaining agreement is insufficient to establish any actual unilateral change in violation of section 8(a)(5) of the Act, particularly when that document acknowledges on the first page that certain provisions may not apply to union employees covered by a collective bargaining agreement.

Although it conceivably might be argued that the distribution of such a document constituted an unlawful "threat" to change terms of employment in violation of section 8(a)(1), no such violation was alleged in the complaint or litigated by the parties. Instead, the facts were pled and litigated solely as a violation of Respondent's bargaining obligations under § 8(a)(5). Respondent requests that paragraph 7 of the complaint be dismissed.

C. Respondent Did Not Unlawfully Refuse To Furnish Information.

As a general proposition, an employer has a duty, upon request, to furnish the union with relevant information regarding the bargaining unit. Where the information does not relate to or concern bargaining unit employees, it is not presumptively relevant, and "a specific need for it must be established." *F.A. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1313 (1995). The burden of establishing this special need is on the Union. Merely asserting that information "is necessary to make a reasonable [contract] proposal is nothing more than another way of saying that it is needed 'to bargain intelligently' and this general claim is simply insufficient to establish relevance." *F.A. Bartlett*, 316 NLRB at 1313.

While these general principles are helpful, "[t]he duty to supply information under § 8(a)(5) turns upon 'the circumstances of the particular case,' . . . and much the same may be said for the type of disclosure that will satisfy that duty." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-315 (1979) (citations omitted). Thus, there is no obligation "to furnish such information in the exact form requested by the representative. It is sufficient if the information is made available

in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949). The Supreme Court has rejected "the proposition that union interests in arguably relevant information must always predominate over all other interests, however, legitimate." *Detroit Edison*, 440 U.S. at 318. When an employer has legitimate concerns about a union request for information based on burdensomeness, confidentiality, or some other bona fide interest, the employer must seek "to accommodate the union's request for relevant information consistent with other interests rightfully to be protected," and "[h]aving made a reasonable accommodation the employer avoids a Board finding that it violated § 8(a)(5)." *United States Testing Co. v. NLRB*, 160 F.3d 14, 20-21 (D.C. Cir. 1999). Although the burden of seeking an accommodation initially falls on the employer, the union has a good faith obligation to participate in the process with the goal of reaching a reasonable accommodation. If the union fails to engage in such an interactive process, the employer's good faith cannot be tested, any charge alleging a refusal to furnish information will be deemed premature, and no violation will be found. If the union does engage in good faith negotiation over an accommodation, but no agreement can be reached, the Board may determine the legitimacy, priority, and appropriate accommodation of the parties' respective interests. *Emeryville Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880, 883-886 (9th Cir. 1971); *Yeshiva University*, 315 NLRB 1245, 1248 (1994); *American Cyanimid Co.*, 129 NLRB 683 (1960).

1. Article 23.3 Requests

The Union made a number of requests for information related to an arbitration proceeding in which the Union alleged that Respondent was violating Article 23.3 of the CBA by failing to remit *on a pre-tax basis* certain monies intended for employees' 401k or stock

purchase plans. The items of information placed in issue by the complaint (¶¶ 9 (a), (c), (l), (n)) are: (a) bi-weekly earnings statements for the period April 13, 2014 through September 6, 2014; (b) bi-weekly earnings statements on an ongoing basis; (c) internal communications relating to the implementation of Article 23.3; (d) internal meeting notes related to Respondent's obligations under Article 23.3; (e) bargaining notes regarding discussions over Article 23.3; (f) collective bargaining proposals exchanged between the parties related to Article 23.3; and (g) documents showing agreements between the parties related to Article 23.3.

a. Historical Earnings Statements

Respondent does not dispute that historical earnings/payroll information was relevant to the Union's grievance over Article 23.3. The Union, however, was not entitled to insist that the information be provided in the form of actual individual earnings statements. In order to print out these statements, a payroll clerk must access, pull up, and print out these statements one-by-one for each of the roughly 100 Southampton bargaining unit employees. Inasmuch as the Union had requested 15 pay periods of earnings statements, this would have required the clerk to access and print out 1,500 earnings statements. Respondent had estimated that it took roughly 3 to 4 minutes to access and print out each statement. (Resp. Exh. 7; Tr. 277-278). Thus, complying with the Union's request would have taken between 75 and 100 hours of clerical time. Rather than provide the actual earnings statements, Respondent promptly provided a payroll report, which reflected all of the earnings information for each employee, including 401k and stock purchase contributions. (GC Exh. 16). It is true that the report was provided in a pdf format, which required the user to flip through pages and count down in order to match up each column with each employee. (Tr. 299-301). But whatever difficulties the Union may have encountered, there is no evidence that the Union complained about the format in which the information was

provided, even looked at what had been provided, or raised any issue until eleven months later (August 2015) when the Union's counsel issued a subpoena for this information in conjunction with the arbitration hearing scheduled for September 10, 2015. This is not particularly surprising inasmuch as at the time that the Union made its initial request on September 5, 2014, it had already demanded arbitration, and the information it was seeking was clearly for use in the arbitration. Thus, the Union had no real need for this earnings information until such time as the arbitration hearing was imminent. When an employer purports to provide responsive information in one format and the union finds this format to be unwieldy, it does not seem unreasonable to expect that the union will voice its concerns or objections and make a request that the information be provided in a different format. It certainly should not be permitted to wait eleven months to voice any objections, and then complain that the information was not furnished in a timely fashion. That is what occurred here, and in these circumstances, no violation of § 8(a)(5) is warranted based on any later asserted deficiencies in the initial response or any claim of untimeliness.

The General Counsel's allegation of an unlawful refusal to furnish historical earnings information must rise or fall on the basis of Respondent's efforts in August/September 2015 to respond to the Union's subpoena, which mirrored its prior information request. In this regard, the record reflects that on September 4, 2015—six days before the arbitration hearing—Respondent furnished a payroll report in Excel spreadsheet format "containing everything found on the 'earnings statements'" sought by the Union. Respondent also advised the Union that it had arranged for the Union "to have access to our payroll system for the limited purpose of accessing and printing (if he desires) the 'earnings statements' he continues to demand from the Company." When the Union's counsel responded on September 8, 2015, the only deficiency that

he raised was that "the payroll report still does not provide the year-to-date figures printed on the earnings statements." (Resp. Exh. 8, p. 2). Approximately 90 minutes later, Respondent's counsel replied, attaching a summary payroll report for 2014 and 2015, as well as the log-in information for the Union to directly access the employees' earnings statements. (Resp. Exh. 8). The summary report, which was also in an excel spreadsheet format, provided the yearly totals requested by the Union's counsel.

Respondent clearly provided the Union with the relevant historical earnings information in a format that was suitable for review. It also provided the Union with access to its payroll system so that it could print the actual earnings statements if it so desired. Although the Union *claims* that it could not print the statements, Beaudoin's unrebutted testimony establishes that he worked with the Union's administrative assistant, who indicated that the problem had been resolved, and that the Union never raised any further issues. Respondent requests that this allegation be dismissed.

b. Ongoing Earnings Statements

To the extent that the Union's request for future earnings information was in essence a continuing request up until the date of the arbitration hearing, Respondent satisfied that request by virtue of the information that it provided in early September 2015. However, insofar as the Union was seeking to impose upon Respondent an indefinite obligation to furnish earnings statements on a bi-weekly basis, this was not a valid request for information. An employer's obligation to furnish any particular type of information on a periodic basis is certainly a mandatory subject of bargaining, and the parties are free to make proposals in that regard during contract negotiations. For example, it is not unusual for collective bargaining agreements to contain provisions requiring the employer to furnish the Union with updated seniority lists on a

periodic (monthly, quarterly, yearly) basis. But Respondent is unaware of any legal precedent that would permit a union to bypass the bargaining process and impose such an obligation simply by making an ongoing information request. If that were the case, a union could unilaterally impose any number of recurring obligations on the employer to provide periodic information: seniority lists, disciplinary notices, accident reports, job change notices, production reports, quality reports, and so on, simply by making information requests, and the employer would lose its Section 8(d) right to say "no" to Union proposals seeking to impose such obligations. The Union would achieve unilaterally what it could not achieve at the bargaining table. Here, the Southampton CBA imposes no obligation upon Respondent to furnish bi-weekly earnings statements on an ongoing basis. (Tr. 165).

In any event, even if the Union could impose such an obligation by making an ongoing information request, Respondent satisfied that obligation by providing the Union with the ability to directly access the requested information. Although the Union apparently argues that it was unable to print out these statements, the undisputed record evidence is that Respondent assisted the Union in resolving whatever problems it was experiencing, and the Union never thereafter raised any issue with regard to its ability to access this information. Respondent requests that this allegation be dismissed.

c. Internal Communications and Meeting Notes

Respondent initially declined to furnish its own internal communications and internal meeting notes related to its implementation of Article 23.3 on the ground that the Union was effectively seeking pre-arbitration discovery. As a rule, "there is no general right to pretrial discovery in arbitration proceedings." *California Nurses Assoc.*, 326 NLRB 1362, 1362 (1998). Thus, the Board has distinguished between requests made prior to any demand for arbitration and

those made after such a demand. *Hawaii Tribune-Herald*, 356 NLRB 661, 684 (2011), *enf'd sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 789 (2001). Although there is no per se rule that relevant information cannot be requested after a demand for arbitration, the Board does scrutinize such requests to determine if they are in the nature of a discovery request, rather than a bona fide request for information. *Oncor Electric Delivery Co.*, 364 NLRB No. 58 (2016).

Here, the Union's request was first made after arbitration had been demanded. Thus, Respondent was not without justification in asserting that the Union's request appeared to be a request for pre-arbitration discovery. Notably, the Union did not challenge this assertion, and the issue did not arise again until the Union issued its subpoena in August 2015. At that time, with an arbitration hearing scheduled for September 10, 2015, Respondent's counsel reevaluated the Union's request and concluded that the Union was entitled to certain substantive "[d]ocuments concerning or relating to Stericycle's implementation of Article 23.3 of the November 1, 2013 to October 31, 2016 collective bargaining agreement," Thus, on September 4, 2015, Respondent furnished 38 pages of documents directly related to the implementation of Article 23.3. (Resp. Exh. 7, pp. 7-40). The Union never asserted that this response was inadequate in any way. In these circumstances, it is apparent that this information request has been fully satisfied.

Insofar as the General Counsel and Union contend that Respondent unduly *delayed* in providing the requested information, the context refutes any such contention. Delay cannot be measured simply in days; rather, it turns on the purpose for which the information is sought and all of the surrounding circumstances. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 n. 9 (1993). The Union's initial information request was filed *after* its demand for arbitration. Thus,

the Union did not seek the information for the purpose of investigating whether to file a grievance or in order to determine whether to continue to pursue the grievance to arbitration. Rather, it sought the information for use in the arbitration hearing itself. This hearing, however, did not commence until September 10, 2015. Respondent furnished this information only a few weeks after the Union's counsel subpoenaed it and six days before the hearing. Thus, the bargaining process, of which an arbitration proceeding is part and parcel, was not impeded in any fashion. No unreasonable delay has been established.

d. Bargaining Notes and Other Bargaining Documents

Respondent declined to provide its bargaining notes and other bargaining documents on grounds of privilege, relevance, and confidentiality. The Union subpoenaed these notes for the arbitration hearing, but the arbitrator revoked this part of the Union's subpoena. (Tr. 311). While the Board may not be bound by the arbitrator's ruling on the Union's subpoena, his ruling does inform the Board. After all, the clear purpose of the Union's request was to utilize the bargaining documents at the arbitration. Thus, even if the Board were to determine that the Union was entitled to these documents, such ruling would not alter the fact that the arbitrator declined to allow such documents to be used during the arbitration.

Further, the Board itself has recognized that a broad subpoena seeking to require a party to open its bargaining files "would be inconsistent with and subversive of the very essence of collective bargaining." *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977). "If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure." *Patrick Cudahy, Inc.*, 288 NLRB 968, 971 (1988) (quoting *Berbiglia* at 1495). In *Boise Cascade Corp.*, 279 NLRB 422, 432 (1986), the Board found that the employer lawfully

refused to furnish the Union with certain bargaining documents related to a maintenance improvement program:

> A proper bargaining relationship between the parties mandates that Respondent be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing its maintenance improvement program. I recognize that complete disclosure might help an arbitrator to reach a more just result, but at the same time it might well have a tendency to frustrate the overall purpose of collective bargaining between the parties. On this particular point, a balancing of the parties' interests must be weighed in favor of Respondent being allowed to withhold from the Union its historical overview of negotiations with the Union and its future negotiating strategy.

Id.

The Union's information request is sweeping in its scope: All documents, including bargaining notes, "showing, the dates of each session, the names of those present, the start and end time of sessions and breaks, sidebar discussions or other communications between sessions, and communications concerning bargaining before or after sessions whether in person, writing or telephone." Much of this information was wholly irrelevant or already known to the Union, and the rest delved into Respondent's bargaining strategies and internal interpretations of proposals. In *Champ Corp.*, 291 NLRB 803, 817 (1988), *enf'd*, 933 F.2d 688 (9th Cir. 1991), the ALJ revoked a similarly broad subpoena seeking "[a]ny and all diaries, notes, memoranda, transcripts, records, or other writings, describing or recording collective bargaining negotiation sessions between [the Employer and the Union.]" The ALJ explained: "Finally, it is concluded that failure to revoke the subpoena, insofar as it may be found relevant, would do unwarranted injury to the process of collective bargaining." *Id. See* David I. Goldman, "Union Discovery Privileges," 17 *Labor Law* 241 (2001). Respondent requests that these allegations be dismissed.

e. Collective Bargaining Proposals and Agreements Reached

Respondent denied the Union's request for copies of all collective bargaining proposals and agreements regarding the 401k plan on the grounds that (1) the Union already possessed such documents and (2) the request was in essence an effort to engage in discovery. A union has a right to relevant information, but it does not have the right to insist that the employer engage in pure busy work to produce what the union already possesses. *See Manitowoc Ice, Inc.,* 344 NLRB 1222, 1238 (2005) (no violation for failing "to furnish to the Union information that the Union already possessed"). The employer does have an obligation to advise the union that it has nothing in its possession that the union does not already have. *Kroger Co.,* 226 NLRB 512, 513 n. 10 (1976). Here, the documents requested—proposals and agreements—were obviously in the possession of both parties. Respondent advised the Union that it already had in its possession all proposals and agreements. At no point did the Union ever dispute the accuracy of this assertion. Respondent requests that these allegations be dismissed.

2. Article 22.3 Requests

At issue here (¶¶ 9 (b), (d), (m), (o)) is the Union's request for the following documents: (a) internal communications regarding Respondent's decision to make "catch-up" medical premium deductions over three pay periods, (b) internal communications regarding Respondent's implementation of Article 22.3, and (3) Respondent's bargaining notes regarding the negotiation of Article 22.3. Respondent denied these requests on grounds of relevance and privilege.

Initially, it is difficult to see what relevance these documents would have to any potential grievance by the Union. The contractual issue was whether or not Respondent had a right to make the catch-up deductions over three pay periods (or some other time period). Respondent's internal communications regarding the manner in which it chose to proceed would not shed light

on whether it violated Article 22.3. Similarly, Respondent's bargaining notes would be of little value given that the issue between the parties arose unexpectedly *after* the parties reached agreement when Respondent ran into problems in implementing the deductions. Further, as explained above, there is a generally recognized privilege which protects a party's internal communications and its bargaining notes from disclosure, as such disclosure would be inimical to the collective bargaining process. For all of these reasons, Respondent requests that paragraphs 9(b), (d), (m), and (o) of the complaint be dismissed.

3. Ebola "Video"

Paragraphs 9 (e) and (p) of the complaint allege that Respondent unlawfully refused to provide the Union with a copy of the Ebola presentation. The record reflects that there was no Ebola "video," but there was a power point presentation on the subject of Ebola. Respondent offered to have the Union review the presentation, but Dagle categorically rejected this offer as inadequate and insisted upon nothing less than a copy of the presentation.

Initially, Respondent contends that the presentation is wholly irrelevant to the Union's representational obligations. While the standard of relevance is broad, it is not unbounded. As set forth in the Morgantown CBA, the employees represented by the Union are regulated medical waste (RMW) workers. RMW is a specific category of waste separate and distinct from Class-A waste, which includes Ebola and other highly infectious types of waste. The undisputed evidence establishes that Respondent does not handle Ebola or other Class-A waste and has advised employees that they should not handle such waste if they come in contact with it. Class A waste is specially packaged and labelled. Because handling Ebola waste is not a term or condition of employment for any unit employee, the presentation did not relate to employee terms and

conditions of employment. Thus, it was incumbent upon the Union to establish some special relevance. The Union failed to make any such showing.

The presentation made by Respondent was merely informational in nature and was not required by the CBA. The Union does not contend that Respondent violated any contractual obligation by giving the presentation, and no grievance was filed or even contemplated. Rather Dagle's contention is that having decided to make the presentation, the Respondent was obligated to provide the Union with a copy in order to allow its experts to assess the accuracy and adequacy of the presentation. This contention, if accepted, would stretch the standard of relevancy beyond its breaking point. While the Union undoubtedly has an interest in protecting the health and safety of unit employees, that interest does not extend to risks to which employees are not exposed. Further, inasmuch as Respondent, in making this presentation, was not purporting to carry out any contractual obligation or to address any term or condition of employment, the Union had no statutory or contractual right to scrutinize or evaluate the adequacy of the presentation. Nothing would have prevented the Union from holding its own meeting with unit employees and providing its own information regarding Ebola. Indeed, if, as the Union contends, it is entitled to a copy of the Ebola presentation simply because Respondent showed it to employees, the same would hold true if the Union, in an effort to educate members, gave its own presentation on Ebola. Respondent would be entitled to a copy in order to assess the accuracy and adequacy of the information. There are many subjects that do not relate to terms and conditions of employment on which an employer (or a union) might wish to provide employees with general information, but merely choosing to provide such information does not create in the other party a right to critique the information provided.

Even if we assume that the presentation was "relevant" in some fashion to the Union's obligations as bargaining representative, Dagle had no right to dictate the format in which the information would be provided. "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593 (1949). When the information requested is complex and detailed, an offer to view may be found inadequate, and copies may be required so as not to impede collective bargaining. *American Telephone & Telegraph Vo.,* 250 NLRB 47 (1980), *enf'd sub nom. CWA, Local 1051 v. NLRB,* 644 F.2d 923 (1st Cir. 1981). However, where the information is less complex, an offer to view may suffice to satisfy the party's bargaining obligation. In *Cincinnati Steel,* the Board held that the employer did not violate the Act by providing *oral* information regarding employees rather than a *written* list as requested by the union. In *Abercrombie & Fitch Co.,* 206 NLRB 464, 466-467 (1973), the Board found no violation when the employer allowed the union to look at an employee's "confession" and related documents, but declined to provide copies as the "information was not complicated." Similarly, in *Roadway Express, Inc.*, 275 NLRB 1107 (1985), the Board found no violation in the following circumstances:

> In this case, the information requested consists of a single-page letter which could be easily read and understood in a matter of minutes. It is undisputed that the Respondent offered to allow examination of the customer's letter. *It is also undisputed that the Union did not avail itself of this offer, or even ask to see the letter, but instead at all times demanded a photocopy.* Under these circumstances, the Respondent has demonstrated its willingness to supply the information to the Union in a reasonable manner.

Id. at 1107 (emphasis supplied).

Here, we are dealing with a short power-point presentation that provided very general information regarding the topic of Ebola. At best, it was of marginal relevance, and there is no

apparent reason why Dagle could not have accepted Respondent's offer, if only to determine whether in fact he needed a copy. Nothing in Respondent's offer required Dagle to waive any supplemental request for a copy of the presentation. Dagle's unwillingness to view the presentation first suggests that he was less interested in seeing the presentation than in standing on his asserted right to receive a copy of *anything* that Respondent showed to employees. Although Dagle offered to enter into some type of confidentiality agreement, such an agreement presupposed that Respondent's offer to view would be inadequate. Until Dagle actually viewed the video, he was not in a position to assess the adequacy of Respondent's offer. Thus, Respondent did not act unreasonably in requesting that Dagle view the video first, and because Dagle chose not to pursue this opportunity, Respondent had no obligation to pursue Dagle's proposal for a confidentiality agreement. Respondent requests that this allegation be dismissed.

4. Vehicle Backing Program

Respondent's vehicle backing program has two components: (a) a power point presentation prepared by Respondent and (b) a copyrighted video prepared by J.J. Keller. On March 2, 2015, Respondent furnished the power point presentation and provided a website link at which the Union could purchase a copy of the video. Dagle never went to the website to even determine how much it would cost. Although the Union appears to contend that the video is still in issue, the General Counsel's complaint raises only a delay allegation. There is no contention by the General Counsel that Respondent is obligated to violate J.J. Keller's copyright and furnish a copy of the video at no cost to the Union. (Complaint ¶¶ 9 (f), (q)). Nor would any such contention, if made, withstand scrutiny.

While the length of time between the Union's initial request on November 24, 2014, and Respondent's March 2, 2015 letter might in the abstract seem unreasonable, delay cannot be

measured simply in days. Rather, it turns on the purpose for which the information is sought and all of the surrounding circumstances. *Good Life Beverage Co.,* 312 NLRB 1060, 1062 n. 9 (1993). Here, Respondent furnished substantial information regarding the James Clay incident on November 25, 2014, only one day after the request was made. When they met on November 28, 2014, Schoennagle advised Dagle that he did not have a copy of the vehicle backing program and would need to inquire further. It appears that with the impending holiday season, both parties allowed the issue to lay dormant until late January 2015 when Dagle inquired again. At that time, Schoennagle told him that the program was proprietary and could not be provided. However, after the Union filed a charge on January 30, 2015, alleging that Respondent was unlawfully refusing to furnish the vehicle backing program, Respondent reevaluated its position and responded as described above on March 2, 2015. The Union never actually filed a grievance over the discipline issued to Clay. While the delay in responding may be longer than desirable, the surrounding circumstances do not establish any harm to the bargaining process. Respondent requests that this allegation be dismissed.

5. Harassment Training Video

Respondent does not dispute the relevancy of the Union's request for information regarding harassment training provided to employees by Respondent. The issue presented is whether the Union is entitled to insist upon receiving a copy of the training, or whether Respondent's offer to permit the Union to view the video was sufficient to satisfy its good faith bargaining obligation. Respondent contends that its offer was sufficient and that the Union arbitrarily and unreasonably refused to pursue this offer, thereby precluding any further testing of the Respondent's good faith.

It is well settled that an employer is under no obligation to furnish requested "information in the exact form requested by the representative. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." *Cincinnati Steel Castings Co.,* 86 NLRB 592, 593 (1949). Here, the training video was short and very general in nature. It was shown, but not distributed, to employees. Respondent's offer for the Union to view the video was a reasonable means of providing the Union with knowledge of the nature of the training provided. *Roadway Express, Inc.,* 275 NLRB 1107 (1985); *Abercrombie & Fitch Co.,* 206 NLRB 464, 466-467 (1973).

The video was proprietary to Respondent, as it was prepared specifically for Respondent by an outside law firm. Thus, Respondent had good cause to take steps to protect the proprietary nature of the video. Providing a copy to the Union would have undermined any claim of proprietary interest by Respondent. Also, nothing in Respondent's offer precluded Dagle, after viewing the video, from requesting a copy again. Indeed, after viewing the video, Dagle would have been in a position to evaluate whether he truly needed a copy and to state the reasons why, and Respondent would have been in a position to respond appropriately. Although each case must be evaluated on its own facts, Respondent contends that as a general principle, an employer's offer to view documents, pictures, or videos imposes upon the union an obligation to pursue that option before insisting upon being provided an actual copy. This is consistent with the bi-lateral nature of bargaining. Dagle's categorical refusal to view any document or video and his rigid insistence upon receiving copies effectively precluded any further testing of Respondent's good faith. In *Times Publishing Co.,* 72 NLRB 676 (1947), the Board observed:

> The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows

> that . . . a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.

72 NLRB at 683.

Even if Dagle's position did not rise to the level of affirmative "bad faith," it clearly was arbitrary and unreasonable. Inasmuch as the test of good faith bargaining is a "fluctuating one," Dagle's arbitrariness precludes finding any bad faith on Respondent's part. Respondent requests that this allegation be dismissed.

6. Supervisor Ron Lobb Information

Respondent provided the Union a copy of the security video showing the incident between Ryan Soubra and supervisor Ron Lobb. Respondent also permitted the Union to view the disciplinary action issued to Lobb. The only justification offered by the Union for seeking further information, particularly sensitive personnel information contained in the supervisor's personnel file, was "to evaluate whether the discipline [of Lobb] is sufficient to deter further misconduct against bargaining unit employees." Respondent contends that this justification was inadequate.

Respondent does not disagree with the general principle that the Union has a legitimate interest in protecting unit employees from misconduct by persons outside the bargaining unit. But that interest is not unlimited and must be balanced against the undeniable fact that the Union does not represent supervisors and does not have any right to bargain over Respondent's disciplinary decisions regarding supervisors. Further, the personal privacy interests of supervisors are no less than those of unit employees. Here, Respondent provided the Union with video footage of the incident, and the Union obviously had access to Soubra's version of the incident. Inasmuch as Soubra was never threatened with discipline and Respondent's

investigation was focused solely on supervisor Lobb's conduct, the Union knew everything it reasonably needed to know about the incident, and the extent and adequacy of that investigation was an issue over which the Union had no role to play. Thus, the Union had no need for, or right to, any further witness statements or investigatory notes, although Respondent did provide at least one witness statement to the Union. Respondent also allowed the Union to view the disciplinary action issued to Lobb. Thus, the Union was able to assure itself that Respondent had addressed the specific incident in issue with Lobb, and it had everything it needed to decide in its own mind whether that discipline was adequate to protect employees. But regardless of the Union's view, the fact remains that it had no statutory right to bargain over additional disciplinary action for Lobb. And that is true whether or not Lobb had prior disciplinary actions for similar misconduct in his personnel file. Respondent requests that these allegations be dismissed.

7. TMX Survey

The only issue posed with regard to the TMX survey is whether the Union was entitled to information reflecting the survey results at other Stericycle facilities. As this information clearly related to facilities and employees not represented by the Union, the burden was on the Union to assert some special need. In this regard, Union counsel argues that this information is necessary for the Union to determine how the Morgantown results compared to the overall Company results, i.e., did Morgantown score higher or lower on their responses to certain statements than other facilities. But this explanation falsely assumes that the Union's bargaining rights turn on how Morgantown employees responded in comparison to how non-unit employees responded to these same statements. The Union's representation rights are limited to Morgantown and comparisons to other facilities are irrelevant.

Further, the survey did not address wages, hours, and terms and conditions of employment in any detail. Instead, it simply asked employees to rate their agreement or disagreement with broad statements regarding work place satisfaction such as (a) "Overall, I am extremely satisfied with Stericycle as a place to work;" (b) "My work gives me a feeling of personal accomplishment; (c) "I have opportunities for advancement in Stericycle;" (d) "My manager does a great job at managing the work; (e) "Customer problems are dealt with quickly." (GC Exh. 29 E). As these types of questions do not implicate specific terms and conditions of employment, it is difficult to see what use the Union could make of this information—with or without comparative data. In any event, data related to other facilities is not presumptively relevant, and the Union made no showing that it needs this data in order to represent unit employees.

Respondent requests that this allegation be dismissed.

8. 2014 Employee Handbook

Although Fox referenced an employee handbook in an email to Dagle, it turned out that no handbooks had been maintained or distributed in Morgantown for several years. This led Respondent to create a 2015 handbook, which it furnished to the Union on March 2, 2015. Respondent contends that the "2014 handbook," which had not been distributed for years and which was superseded by the 2015 handbook, is of no relevance to the Union. Respondent requests that this allegation be dismissed.

D. The Challenged Policies And Handbook Provisions Are Lawful.

The legal framework for evaluating the lawfulness of employer rules and policies is well settled. The basic "inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*, 203

F.3d 52 (D.C. Cir. 1999). "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village – Livonia,* 343 NLRB 646, 646 (2004). If the rule or policy explicitly restricts section 7 activity, it will be deemed unlawful. However, absent an explicit restriction on Section 7 rights, the rule or policy will be found unlawful only if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; (3) or the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. Where the rule does not explicitly restrict protected activity, the Board "will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable." *Id.* (emphasis included).

Even if the rule or policy explicitly restricts Section 7 activity or can be reasonably read to restrict such activity, the Board is required to evaluate the employer's asserted business justification "[t]o strike a proper balance between the employees' rights and the Respondent's business justification." *Caesar's Palace,* 336 NLRB 271, 272 (2001). "The issue is whether the interests of the Respondent's employees . . . outweighs the Respondent's asserted legitimate and substantial business justifications." *Id.* The Board must accommodate the respective rights of the parties "with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956).

1. Harassment Complaints

The employee handbook distributed to Morgantown employees in February 2016 contained a detailed policy prohibiting harassment of all types, including, but not limited to, sexual harassment. (GC Exh. 22, pp. 8-9). In a separate section, entitled "Retaliation," the handbook provides:

> Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.
>
> **What action should you take if you feel you have been a victim of harassment or retaliation?**
>
> If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:
>
> 1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and
>
> 2. Report the incident and the name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [Phone Number]. The Help Line accepts anonymous complaints of any kind.
>
> All complaints will be promptly investigated. *All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.*

(GC Exh. 22, p. 10).

The General Counsel alleges that the italicized language violates Section 8(a)(1). This "confidentiality" language does not expressly restrict Section 7 rights, and there is no contention (or evidence) that it was adopted in response to protected activity or that it has been applied to Section 7 activity. Thus, the initial question is whether employees would reasonably read this

language as restricting their Section 7 rights. Respondent contends that this question must be answered in the negative.

First, this confidentiality language must be read in the context of the extensive harassment policy of which it is a part. The clear intent of the policy is to protect employees from all forms of harassment and to provide an effective mechanism by which employees who believe that they have been subjected to harassment will feel comfortable to report such conduct to the employer so that an investigation can be conducted, appropriate remedial action can be taken, and appropriate protective measures can be established. The purpose of the policy is not to restrict Section 7 rights, but to protect employees. Any employee reading the policy would readily understand this lawful purpose. This understanding is further reinforced by the fact that the challenged language appears under the highlighted (bold font) heading: **What action should you take if you feel you have been a victim of harassment or retaliation?** Many employees may be reluctant to report incidents of harassment if their complaints are subject to being revealed throughout the workforce. They may fear embarrassment or possible retaliation by the alleged perpetrator. Thus, the policy even provides for anonymous complaints. Third, the policy does not prohibit *all* discussion of a harassment complaint or investigation, and it is stated in terms of a *pledge by Respondent* rather than as an *employee rule of conduct*. No penalty is attached to possible violation of the pledge and the pledge is not absolute, but only "to the fullest extent practicable." Finally, while there may be circumstances in which an employee's discussion of a harassment complaint could be deemed to be protected by Section 7, there are numerous other circumstances in which such discussion would be neither concerted nor protected. For all of these reasons, the challenged language cannot reasonably be read as chilling employee Section 7 rights.

But even if the language could be read to restrict Section 7 rights, Respondent has a substantial and compelling business interest that outweighs whatever limited restriction on Section 7 rights might occur by the mere maintenance of the challenged language in the policy. The Board has recognized that "employers have a legitimate right to adopt prophylactic rules banning [harassment] because employers are subject to civil liability under federal and state law should they fail to maintain 'a workplace free of racial, sexual, and other harassment.'" *Martin Luther, supra,* 343 NLRB at 647 (quoting *Adtranz ABB Daimler-Benz Transportation, N.A., Inc.*, 253 F.3d 19, 27 (D.C. Cir. 2001))."Title VII [of the Civil Rights Act of 1964] is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 764 (1988). In cases where there is no tangible adverse employment action, an employer may assert an affirmative defense if it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. Evidence that the "employer had promulgated an antiharassment policy with complaint procedure" is pertinent to establishing this affirmative defense. *Id.; Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642, 653-654 (10th Cir. 2013); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001).

One of the elements of an effective harassment policy is the inclusion of a confidentiality provision. "By providing clear direction as to how to report sexual harassment and by including a confidentiality and anti-retaliation provision, [the employer's] policy was reasonably calculated to prevent and promptly correct any sexually harassing behavior." *Id.; see Brink v. McDonald,* 116 F. Supp. 3d 696, 700 (E.D. Va. 2015). "Equal Employment Opportunity Commission

guidelines suggest that information about sexual harassment allegations, as well as records related to investigations of those allegations, should be kept confidential," and "the obligation to comply with such guidelines may often constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations." *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015). Indeed, the federal courts have upheld the right of employers to discharge employees who violate the confidentiality provisions of a bona fide harassment policy. *Newsday, Inc. v. Long Island Typographical Union 915, CWA*, 915 F.2d 840, 845 (2d Cir. 1990). Some federal courts have even required, as part of injunctive relief, that employers include confidentiality provisions in their harassment policies. *EEOC v. New Breed Logistics, Inc.*, 2013 WL 12043550 (W.D. TN 2013); *Arizona Department of Law v. ASARCO, LLC,* 798 F.Supp. 2d 1023, 1059 (D. Arizona 2011), *enf'd*, 773 F.3d 1050 (9th Cir. 2014).

It seems beyond dispute that Respondent has a substantial and compelling business justification for including a confidentiality provision in its harassment policy. It also is clear that the confidentiality provision adopted by Respondent is narrowly tailored and that its business justification outweighs the limited impact, if any, that this provision arguably might have on the exercise of Section 7 rights. Thus, the confidentiality provision is limited to harassment investigations, where the need for confidentiality is particularly acute. It is unlike the broad confidentiality provision found unlawful by the Board and the court in *Hyundai America*, *supra,* where the provision banned "discussions of *all* investigations, including ones unlikely to present these concerns [regarding compliance with federal and state law]." 805 F.3d at 314. Rather, it is more akin to *Desert Palace, supra,* where the employer lawfully "imposed a confidentiality rule during an investigation of alleged illegal drug activity in the work place . . . to ensure that

witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." 336 NLRB at 272. Although the confidentiality provision here is not limited to a single specific investigation as in *Desert Palace,* it is limited to "particular types of investigations." *Hyundai America,* 805 F.3d at 314. Because employers can protect themselves from hostile environment harassment claims only by adopting and disseminating an actual written harassment policy that covers all types of harassment investigations, it would be impossible to impose such provisions on a case-by-case basis. The confidentiality language adopted by Respondent is as narrow as it can be without being totally ineffective. It does not impose a requirement of "strict" confidentiality," but only "to the fullest extent practicable," and no disciplinary penalty is stated if an employee does not maintain confidentiality. Respondent requests that paragraph 6 (a) (iv) of the complaint be dismissed.

2. Electronic Communications Policy

The handbook distributed to the Morgantown employees contained a two-page Electronic Communications Policy. The introductory paragraph to this policy provided:

> Stericycle has established a policy relating to access and disclosure of electronic messages created, sent or received by team members using the Company's voicemail system, or an authorized internet email service. The Company intends to honor the policies set forth below, but reserves the right to modify, change or revoke them at any time as may be required under the circumstances. Use of the Company's voicemail/email equipment for electronic communications constitutes a team member's affirmation and acceptance of this Company policy. *A substantial portion of our business is transacted by telephone and over the wide area network. Therefore in order to maintain the efficiency of these systems non-business usage must be restricted. Phone and data lines must be kept open for business purposes. Accordingly, personal telephone calls and email should be infrequent and brief, and limited to urgent family matters.* Since the telephone, company-issued cell telephones and voicemail system are company property, Stericycle reserves the right to access voicemail messages at any time with no notice. Team members should have no expectation of privacy or confidentiality as to the content. Emergency calls to team members

> should be routed directly to the Supervisor so the team member can be located to accept the call.

(GC Exh. 22, p. 26)

The General Counsel challenges only the highlighted language in this policy. On its face, this language does not explicitly restrict Section 7 activity, and there is no contention or evidence that it has been applied to restrict Section 7 activity. Thus, the question becomes whether it can be reasonably read to restrict Section 7 activity, which turns on the extent to which employees have a Section 7 right to use an employer's telephone and email systems. In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the Board overruled prior precedent, and held:

> [W]e will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

The Board expressly limited its decision to use of an employer's email system and expressly chose not to address other types of electronic communications systems. And the right it recognized "applies only to employees who have been granted access to the employer's email system in the course of their work and does not require employers to provide access."

It is not clear from the General Counsel's complaint whether its challenge to this language encompasses both the use of Respondent's telephone and email systems, or is limited solely to the restrictions on email usage. Insofar as the General Counsel challenges the restrictions on telephone use, nothing in the Board's *Purple Communications* decision supports this challenge. As noted, the Board carefully limited its decision to an employer's email systems. Although the Board majority questioned the validity of the Board's analysis in its prior

"equipment" cases such as *Mid-Mountain Foods,* 332 NLRB 229 (2000), *enf'd,* 269 F.3d 1075 (D.C. Cir. 2001), it did not expressly overrule *Mid-Mountain* insofar as it applied to equipment other than email, and it carefully distinguished the use of an employer's telephone system from email:

> If an employee is using a telephone for Section 7 or other nonwork-related purposes, that telephone line is unavailable for others to use. . . . One or more employees using the email system would not preclude or interfere with simultaneous use by management or other employees. Furthermore, unlike a telephone, e-mail's versatility permits the sender of a message to reach a single recipient or multiple recipients simultaneously; allows the recipients to glimpse the subject matter of the message before deciding whether to read the message, delete it without reading it, or save it for later; and once opened, allows the recipient to reply to the sender and/or other recipients, to engage in a real-time "conversation" with them, to forward the message to others, or to do nothing. Neither the telephone nor any other form of "equipment" addressed in the Board's prior cases shares these multidimensional characteristics.

Thus, until such time as the Board specifically addresses the statutory right of employees to utilize an employer's telephone system for Section 7 purposes, *Mid-Mountain* remains controlling law. And the Board in *Mid-Mountain* cited its prior decision in *Union Carbide Corp.,* 259 NLRB 974, 980 (1981), *enf'd in pert. part,* 714 F.2d 657 (6th Cir. 1983) for the proposition that there is no "statutory right of an employee to use an employer's telephone for personal or nonbusiness purposes, such as union organizing matters." 332 NLRB at 230. It follows that this allegation must be dismissed to the extent it challenges the handbook language regulating the use of Respondent's telephone system.

With respect to the handbook language regarding use of Respondent's email systems, the record fails to establish that any statutory employees [§ 2(3) of the Act, 29 U.S.C. § 152(3)] have "been granted access to the employer's email system in the course of their work." The fact that the handbook contained a policy regarding email use does not, in itself, establish that any

specific group of employees actually utilized Respondent's email system as part of their work. The record contains a number of emails to and from managers and supervisors as part of their work, but not a single email to or from a unit employee or even a non-unit employee who was not a manager or supervisor. An essential element of General Counsel's case is that at least one statutory employee has been granted access to Respondent's email system as part of their work. In *Purple Communications,* the employees in question were video relay interpreters who routinely used company computers throughout the day and who had assigned email accounts. Here, the Morgantown employees perform manual labor inside a plant that involves handling medical waste. There is no evidence that they had Company email accounts, and the nature of their work precludes drawing an inference of access to the Company's email system. At least one ALJ has held that the absence of record evidence establishing that employees had been granted access to the employer's email system required dismissal of an allegation challenging a handbook provision strictly prohibiting personal use of Company email. *Shamrock Foods Co.,* 2016 WL 555903, Case No. 28-CA-150157 (2016, ALJ Jeffrey D. Wedekind). Respondent contends that the same result is required here.

Even if it could be assumed that statutory employees had been granted email access, the handbook policy does not ban *all* personal use. Instead, it recognizes that some personal use is permissible, but requests that such use be "infrequent and brief, and limited to urgent family matters." The request that usage be "infrequent and brief" does not contravene the *Purple Communications* holding, as nothing in the majority opinion suggests that employees have any unlimited right to utilize email for Section 7 purposes. With respect to the request that usage be limited to urgent family matters, while this might possibly be interpreted as not including Section 7 purposes, the policy does not expressly prohibit such use, nor does it attach any consequence if

an email is sent for Section 7 purposes. Finally, the business purpose is legitimate and clearly stated in the policy: "A substantial portion of our business is transacted by telephone and over the wide area network. Therefore in order to maintain the efficiency of these systems non-business usage must be restricted. Phone and data lines must be kept open for business purposes." Respondent contends that this business justification outweighs any limited restriction on Section 7 rights that may be imposed by this provision.

Respondent requests that paragraph 6 (a) (v) of the complaint be dismissed.

3. Use of Personal Electronic Devices

On page 28 of the handbook distributed to the Morgantown employees is a policy regarding the use of personal electronic devices:

> *The use of personal cell phones or other personal electronic devices such as MP3 players is prohibited in waste processing, warehouse, loading and unloading areas during operating hours and any areas subject to vehicle movement at any time.* The following are some examples of personal electronic devices, however this list is not all inclusive: Smartphone, MP3/MP4 players, Bluetooth devices (e.g. earbuds/headphones), portable DVD players, e-readers and portable gaming systems. Company issued mobile phones may be used by managers or supervisors in these areas only when such use is required for conducting company business. *Personal mobile phones and all other personal mobile electronic devices are to be kept in the team member's locker. Personal phone calls and use of personal electronic devices shall be restricted to meal and break periods. Violation of this policy may result in disciplinary action up to and including termination.*

(GC Exh. 2, p. 28).

The separate policy introduced by the General Counsel as GC Exhibit 31 is not materially different from the handbook language cited above. Thus, Respondent will discuss both policies together as a single policy. On its face, this policy does not purport to address Section 7 activity. There is no contention nor evidence that the policy was adopted in response to, or has ever been applied to restrict, Section 7 activity. Before addressing whether employees reasonably would

construe this policy to restrict Section 7 activities, it is necessary to set forth what this policy does and does not require or prohibit. First and foremost, the policy prohibits the use of personal cell phones and electronic devices in areas where work is being performed. Second, the policy requires that personal cell phones be maintained in employee lockers while employees are on work time. Third, it expressly permits employees to use personal cell phones during non-working time. Fourth, the policy does not restrict the purposes for which cell phones and personal electronic devices may be used by employees during non-working time. Thus, the General Counsel's challenge to this policy turns on the novel proposition that employees have a statutory right to bring personal cell phones and electronic devices into the working areas of an industrial facility, to maintain those devices on their person during working time, and to utilize those devices in work areas of the facility even when work is being carried on, irrespective of any obligations imposed upon the employer to provide a safe working environment.

With respect to the policy's application to personal electronic devices such as MP3 devices and e-readers, the General Counsel's position is easily rejected. Listening to music and reading books are worthwhile activities, but they do not constitute conduct protected by the Act. And these types of devices are not mediums of communication between employees. To the contrary, they tend to promote solitude by the employee who is utilizing the device. Respondent is unaware of any Board or court decision, or even any plausible legal theory, which would prohibit an employer from restricting, or even banning outright, the use and possession of personal music and reading devices.

As for personal cell phones, the General Counsel's contention is presumably based on the Board's decisions in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), *T-Mobile USA*, 363 NLRB No. 171 (2016), and *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), where

the Board found unlawful certain policies banning employees from taking pictures and making video/audio recordings during non-working time. These decisions are discussed in greater detail below in conjunction with the challenged camera policy, but they are wholly inapplicable to the instant personal electronics device policy because that policy says absolutely nothing about taking pictures or making video/audio recordings. It merely regulates where personal cell phones must be maintained and where and when they may be used. As then-Member Johnson observed (n. 12) in his dissent in *Rio-All Suites*, "there is no Sec. 7 right to *possession* of a camera or other recording device by employees on an employer's property." The majority did not expressly reject that proposition, as the policy in question addressed only the use of recording devices, not the possession of such devices.

To be sure, one must possess a recording device in order to be able to use it, but with the exception of actual Section 7 *communications* (literature, pins, buttons, caps, etc.), the Board has never, to Respondent's knowledge, held that employees have a statutory right to possess any specific personal property while *inside* their employer's work facility simply because that property might *facilitate* Section 7 activity. There are many devices that conceivably might aid employees in engaging in Section 7 activities: cameras, cell phones, DVD players, laptop computers, PA systems, megaphones, portable booths, card tables, tape recorders, binoculars, portable printers, facsimile machines, to name some that come to mind. If an employer permits employees to possess and use such devices inside its facility, it may not discriminate based on Section 7 activity, but employees do not have a statutory right to possess or use these devices inside their employer's facility. As Respondent's policy merely addresses where and when personal cell phones may be used and does not proscribe the purposes for which cell phones may be used, it cannot reasonably be read as restricting Section 7 activity.

Even if the policy could be construed as restricting Section 7 activity in some respect, the limited impact on Section 7 activity is far outweighed by the substantial business justifications for the policy. Respondent's Morgantown facility is a medical waste processing facility. Employees unload boxes and containers of medical waste, which can be dripping with bodily fluid. Employees wear extensive protective equipment in order to handle such waste. The waste is moved through the facility in wheeled vehicles and processed through large pieces of equipment which shred the medical waste. The dangers inherent in using cell phones, MP players, earbuds, and other devices in operating and vehicular traffic areas of the facility are self-evident. Such use not only creates safety hazards, but it invites careless errors and mishandling of medical waste. (Tr. 141-144).

Respondent requests that paragraphs 6 (a) (i) and 6 (c) of the complaint be dismissed.

4. Personal Conduct Policy

> *In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.*
>
> ***The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.***
>
> Possession, consumption, distribution or sale of alcohol, drugs or illegal substances while on premises, or reporting to work under the influence of the above mentioned items.
>
> Carrying or possessing firearms or weapons of any kind on the Company's property or while engaged in Company assignments
>
> Theft
>
> Pilfering of waste

Use of profanity or inappropriate language while on Stericycle premises whether on duty or not.

Gambling on Stericycle premises

Acts of violence

Engaging in behavior which is harmful to Stericycle's reputation

Falsifying any Stericycle record or report, including but not limited to an application for employment, a time record, a customer record, manifest, invoices, receiving records, etc.

Willfully defacing, damaging, or unauthorized use of Company property or another team member's property

Sleeping on the job

Continued or excessive absenteeism or tardiness

Violation of safety and/or operating rules

Smoking or "Vaping" in "No Smoking" areas

Refusing to follow the directions of a supervisor or otherwise being insubordinate

Violation of the Sexual Harassment policy

Failure to punch/swipe in and out when appropriate or punching in/out for other team members

(GC Exh. 22, p. 30).

Again, this set of rules does not explicitly restrict Section 7 activity, was not adopted in response to Section 7 activity, and has not been applied to Section 7 activity. With respect to the introductory paragraph, it is not entirely clear whether the General Counsel challenges the paragraph in its entirety or only certain sentences or phrases within the paragraph. By themselves, the first, third, and fourth sentences cannot be read as prohibiting Section 7 activity. These sentences merely note the general need for rules of conduct and for employees to conduct

themselves in a manner consistent with efficient operations. Respondent assumes that the General Counsel's challenge is primarily, if not exclusively, focused on the second sentence: *Conduct that that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated.* Although Section 7 activity may sometimes harm the reputation of an employer, the Board and courts have never held that employees have a right to maliciously or intentionally harm their employer's business or reputation. *NLRB v. Electrical Workers Local 1229 (Jefferson Standard*), 346 U.S. 464, 472 (1953); *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252-53 (2007), *enf'd sub nom. Nevada Service Employees Union v. NLRB,* 358 Fed Appx. 783 (9th Cir. 2009); *Stanley Furniture Co.*, 271 NLRB 702, 703-704 (1984). As the introductory paragraph is limited to malicious and intentional conduct, it is clearly lawful. What follows are 17 rules of conduct, only one of which the General Counsel alleges to be unlawful: *Engaging in behavior which is harmful to Stericycle's reputation.* Viewed in isolation, this rule arguably is overly broad as it is not limited to malicious or intentional conduct. However, the Board has declined to read handbook provisions out of context. Here, the rule in question must be considered both in the context of the introductory paragraph and the rules that surround it. As discussed, the introductory paragraph is lawful and explicitly proscribes only conduct that maliciously or intentionally harms Respondent's reputation. It seems likely that an employee would interpret the rule in question as merely a short-hand restatement of the general policy. But even without this introductory language, the challenged rule is listed right in the middle of sixteen other rules that clearly do not encompass protected activity and equally clearly do proscribe conduct that employees reasonably understand to be legitimately not in the interest of Respondent. The immediately preceding rule prohibits violence and the immediately following rule prohibits falsification of company documents. All of the other rules reference clearly

unacceptable conduct. In the context of these other rules, employees would not reasonably interpret this rule as prohibiting protected activity. Rather, the rule is reasonably interpreted as proscribing clearly harmful (and unprotected) conduct such as moral turpitude, illegal acts, unethical behavior, and misuse of medical waste received from medical facilities. Respondent requests that paragraph 6 (a) (ii) of the complaint be dismissed.

5. Conflicts of Interest

The Morgantown handbook contains the following Conflict of Interest policy:

> *Stericycle will not retain a team member who directly or indirectly engages in the following:*
>
> -- *An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.*
>
> -- An activity in which a team member obtains financial gain due to his/her association with the Company.
>
> -- An activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.

(GC Exh. 22, p. 33).

The General Counsel challenges only the italicized provision. But, as with regard to the Personal Conduct policy, this language must be read in context and not in isolation. This is a "Conflict of Interest" policy, which employees reasonably understand to deal with their financial and business activities. A conflict of interest would exist if the employee accepted part-time work with, or assisted, a competitor of Respondent. It would exist if the employee used his association with Respondent to further his personal interests. A conflict of interest would exist if he engaged in unethical behavior. A conflict of interest would exist if he flagrantly and publicly defamed Responded or a customer. All of these activities would reflect adversely upon the integrity of Respondent and management, but none would involve protected activity. Employees

would not reasonably construe this policy to prevent or restrict genuine union or concerted activity. The language in this policy is not materially different than the rules found lawful in *Lafayette Park, supra.* There, Rule 6 prohibited "engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives." Rule 31 prohibited improper conduct "which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community. The Board found both rules lawful. 326 NLRB at 824-825.

Respondent requests that paragraph 6 (a) (iii) of the complaint be dismissed.

6. Camera & Video Use Policy

1.0 PURPOSE

To ensure that proprietary information, treatment processes, equipment, transfer station operations and warehouse operations remain under the control of Stericycle, Inc.

2.0 SCOPE

This policy applies to all employees working for Stericycle, Inc., vendors and visitors to Stericycle facilities.

3.0 CAMERA USAGE

3.1 Team members are prohibited from taking pictures with a personal or company issued camera or cell phone camera of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.

3.2 Visitors or vendors are prohibited from taking any pictures with a personal camera or cell phone camera of any Stericycle property, operation, or equipment without the permission of Stericycle management.

3.3 Regulatory agencies (i.e. OSHA, DOT or other agency) may take photographs as part of their inspection.

4.0 VIDEO AND TAPE RECORDING

> 4.1 *Team members are prohibited from taking video or audio recordings with a personal or company camera, camcorder, or other device of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.*
>
> 4.2 Visitors or vendors are prohibited from taking video or audio recordings with a personal or company camera, camcorder, or other device of any Stericycle property, operation, or equipment without the permission of Stericycle management.
>
> 4.3 Regulatory agencies (i.e. OSHA, DOT or other agency) may take video or audio as part of their inspection.

(GC Exh. 30).

The General Counsel challenges the highlighted provisions, and as with the other policies in issue, there is no contention that this policy was adopted in response to protected activity or that it has been applied to protected activity. The General Counsel undoubtedly will rely on the Board's recent decisions in *T-Mobile USA,* 363 NLRB No. 171 (2016); *Whole Foods Market, Inc.,* 363 NLRB No. 87 (2015); and *Rio All-Suites Hotel, supra.* Respondent disagrees with the Board's analysis in those cases, but recognizes that the ALJ is bound by them. Nevertheless, each of these decisions is distinguishable in material respects and not dispositive of Respondent's policy.

In *T-Mobile,* the employer's policy prohibited employees "from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace," absent "permission from an employee's Manager, HR Business Partner, or the Legal Department." Further, "[i]f an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants." Similarly, in *Whole Foods,* the policy prohibited the recording of "conversations, phone calls, images or company meetings" without approval from management, as well as all

parties to the conversation. The employer representative testified that the policy applied everywhere on the property and at all times and that it applied even if the employee was engaged in protected activity. The Board characterized the rules as "unqualifiedly prohibit[ing] all workplace recording." In *Rio All-Suites*, the policy prohibited all picture taking and recording on Company "property" without management approval. The Board found each of these policies overly broad and not sufficiently tailored to protect any legitimate business interests of the employer.

In contrast to these three cases, Respondent's policy does not unqualifiedly prohibit all picture taking or recording on Company property. Nor does it prohibit taking pictures of "people" or recording "conversations." Respondent's policy only prohibits taking pictures of "any Stericycle property, operation, or equipment." The limited scope of the prohibition is also demonstrated by the stated purpose of the policy: "To ensure that proprietary information, treatment processes, equipment, transfer station operations and warehouse operations remain under the control of Stericycle, Inc." Thus, employees would not reasonably interpret this policy as prohibiting protected activity. In the three cases cited above, the Board stated that "protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." Respondent's policy clearly does not prohibit the recording of protected picketing, workplace discussions, inconsistent application of rules, or possible evidence in a legal proceeding. The only one of these examples that the policy, on its face, arguably would preclude is "documenting unsafe workplace equipment." Yet, it is clear from the

face of the policy that its intent is not aimed at preventing such documentation, but at protecting Respondent's proprietary interests.

Whatever limited impact Respondent's policy has on the right of employees to engage in protected activity is far outweighed by the substantial business justification set forth in the policy. Respondent's equipment and processes are highly proprietary and are unique in the industry. This justification is far more compelling than the generalized interest in open communications cited by the employers in the three cases cited above. The Board, however, did not reject these generalized interests as being "without merit," but as being "based on relatively narrow circumstances, such as annual town hall meetings and termination-appeal peer panels." Here, Respondent's interests are not based on narrow circumstances and its policy is narrowly drawn to protect those interests. In this regard, it is akin to the justification of protecting patient privacy found by the Board in *Flagstaff Medical Center*, 357 NLRB 659 (2011), *enf'd pertinent part*, 715 F.3d 928 (D.C. Cir. 2013) as sufficient to justify a ban on recording images in a hospital.

Further, Respondent's policy even permits pictures to be taken of equipment with permission. While employees may not be required to obtain permission from their employer in order to engage in Section 7 activities, it is inaccurate to say that a policy is inherently unlawful if it contains a provision requiring permission. For example, the Board has held that a rule prohibiting employees from leaving their work station without permission is lawful, even though there may be circumstances in which employees have a Section 7 right to leave their work station. *Heartland Catfish Co.,* 358 NLRB 1117 (2012); *2 Sisters Food Group, Inc.,* 357 NLRB 1816, 1817-18 (2011). Similarly, to Respondent's knowledge, the Board has never held that a policy requiring employees, under threat of discipline, to work overtime, unless excused by their

supervisor, to be unlawful even though there may be circumstances in which employees have a Section 7 right to refuse to work overtime. It bears repeating that "[w]here, as here, the rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." *Martin Luther*, 343 NLRB at 647. Respondent requests that paragraph 6 (b) of the complaint be dismissed.

E. A Nationwide Posting Remedy Is Inappropriate.

In the event that it is found that one or more of the challenged policies are overly broad and violative of Section 8(a)(1), which Respondent denies, the record fails to support the nationwide posting remedy requested by the General Counsel and the Union. A nationwide posting remedy is only appropriate when the record establishes that the unlawful rules or policies are maintained or in effect at all of the employer's facilities nationwide. *E.g., Mastec Advance Technologies*, 357 NLRB No. 17 (2011), *enf'd sub nom. DIRECTV v. NLRB,* ____ F.3d __ (D.C. Cir. 2016); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005). On the other hand, when "the record does not make clear whether the unlawful provisions at issue are contained in the handbooks in use at other sites . . . a nationwide order is not appropriate." *Rio All-Suites Hotel & Casino,* 362 NLRB No. 190, n. 15 (2015); *accord, Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 879 n. 19 (2011). Such is the case here. Indeed, the complaint alleges only that the handbook was "distributed . . . to employees in the Morgantown Unit" and that Respondent "maintained the rules in effect for employees in the Morgantown Unit." The sole evidence presented by the General Counsel regarding the geographic scope of the handbook was a training roster sheet reflecting dissemination at Morgantown. It is true that the handbook in question states that it is for "U.S. Based Team Members," but this is insufficient to establish actual dissemination or

maintenance at other facilities. This is particularly true given that it is conceded that this handbook was not distributed or maintained at the Southampton facility. Further, the development of this handbook occurred as a result of an information request at Morgantown and Respondent's discovery that no handbook had been distributed or maintained at Morgantown for several years. In these circumstances, any posting requirement must be limited to Morgantown.

F. Respondent Should Have Been Permitted To Present Evidence On Its Eighth Affirmative Defense.

Respondent maintains, for the reasons set forth in its motions to dismiss, that the complaint should have been dismissed. Respondent recognizes that the ALJ has ruled on this motion and that the issue is preserved for Board review. Nevertheless, Respondent urges the ALJ to reconsider this ruling, as well as his ruling precluding Respondent from calling witnesses and presenting evidence on this defense. At the hearing, Respondent's counsel stated a number of relevant questions that remain unanswered. For the most part, these questions concern the nature of the Regional Director's conflict that caused him to recuse himself with the issuance of the Second Consolidated Complaint. In opposing Respondent's motion to dismiss, the General Counsel contended that the Director's conflict was only "potential" and not "real." But there is no evidence that would support this contention since neither the Director nor the General Counsel has stated precisely why the Director recused himself in *this* case and not in other cases. If, for example, the Director had some type of personal or financial relationship, either through the Peggy Browning Fund or some other means, with either Local 628 or its legal counsel, the conflict would be more than "potential;" it would be real and immediate. Respondent, however, was not allowed the opportunity to develop or present such evidence. Respondent contends that this was harmful error.

CONCLUSION

Respondent respectfully requests that the Second Consolidated Complaint, as amended, be dismissed in its entirety.

Dated this 7th day of October 2016

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing BRIEF by electronic mail on the following parties:

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This the 7th day of October 2016.

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